

*IN THE MATTER OF
THE PETITION OF
CALPINE CORPORATION*

* IN THE
* CIRCUIT COURT
* FOR
* BALTIMORE CITY, PART 23
* Case No.: 24-C-12-002853

* * * * *

MEMORANDUM OPINION

The above-captioned matter comes before this Court upon the consolidated Petitions for Judicial Review of Order No. 84815, issued on April 12, 2012, and Order No. 85501, issued on April 16, 2013, by the Public Service Commission of Maryland (“Commission”), filed by Petitioners Calpine Corporation (“Calpine”), Baltimore Gas and Electric Company (“BGE”), Potomac Electric Power Company (“Pepco”), Delmarva Power & Light Company (“Delmarva”), and the Maryland Office of People’s Counsel (“OPC”). (Docket #00009001, 00020001). Calpine filed a Memorandum in Support of Petition for Judicial Review (docket #00024000) on June 14, 2013. BGE, Pepco, and Delmarva (collectively, “EDCs”)¹ filed a Memorandum in Support of Petition for Judicial Review (docket #00025000) on June 14, 2013. The OPC filed a Memorandum in Support of Petition for Judicial Review (docket #00022000) on June 14, 2013.

Respondent Commission filed a Memorandum in Opposition to Petitions for Judicial Review (docket #00031000) on July 26, 2013, and an Amended Memorandum in Opposition to Petitions for Judicial Review (docket #00038000) on August 13, 2013. Competitive Power Ventures Holdings, LLC (“CPV”) filed an Answering Memorandum in Response to the Memoranda of Calpine, the EDCs, and the OPC (docket #00035000) on July 26, 2013. The OPC

¹ Electric Distribution Companies.

filed an Answering Memorandum in Response to the Memoranda of Calpine and the EDCs (docket #00032000) on July 26, 2013.

Calpine, the EDCs, and the OPC each filed a Reply Memorandum in Support of Petition for Judicial Review (respectively, docket #00041000, 00040000, and 00039000) on August 16, 2013. On September 10, 2013, a hearing was held on the consolidated Petitions for Judicial Review of Order Nos. 84815 and 85501.

Upon consideration of the parties' filings and arguments, this Court shall **AFFIRM** Order Nos. 84815 and 85501 of the Commission. The Court's reasoning is elaborated herein.

I. FACTUAL & PROCEDURAL BACKGROUND

On September 29, 2009 — the Commission initiated a regulatory proceeding, *In the Matter of Whether New Generating Facilities are Needed to Meet Long-Term Demand for Standard Offer Service* (Case No. 9214)² — to investigate the long-term reliability and adequacy of service in Maryland and ultimately whether the Commission “should exercise its authority to order electric utilities to enter into long-term contracts to anchor new generation or to construct, acquire, or lease, and operate, new electric generating facilities in Maryland.” (Order No. 84815 2). On December 29, 2010, after reviewing various comments filed in the proceeding, the Commission prepared a draft Request for Proposals for New Generation (“RFP”), which would be issued by the EDCs in an effort to obtain proposals from interested parties. The Commission invited comments on the draft, and as a result of nearly thirty parties filing such comments, the Commission modified the RFP. *Id.* at 2-3.

² Standard Offer Service (“SOS”) customers buy electricity from their utility as opposed to buying it from a different company, known as an alternate electricity supplier. (Mem. of Pet'r OPC 1).

On September 29, 2011, the Commission sent notice to the EDCs³ directing them to issue the modified RFP and informing them that a hearing on the need for new generation and, if required, the amount of need would be held on January 31, 2012. (Order No. 84815 3). The notice summarized the comments received and the changes made to the draft and again invited comments. Due to some of the comments and questions received, the Commission issued an Amended RFP on December 8, 2011, which extended the due date for proposals to January 20, 2012. *Id.*

The Amended RFP sought bids from power plants “for new, natural gas-fired Generation Capacity Resources (as defined by PJM⁴) to be located inside the Southwest MAAC⁵ Locational Deliverability Area.” *Id.* at 4. Under the RFP, one or more of the EDCs would enter into a financial arrangement with the “chosen bidder” power plant under a Contract for Differences (“CfD”): the power plant would “offer and deliver the generation output into the PJM capacity, energy, and ancillary services markets” and the EDC(s), who would not obtain physical delivery of the generation, would guarantee the power plant a fixed price for those sales. *Id.* Thus, if the power plant’s actual revenue from the PJM sales is less than the fixed price, the EDC(s) will pay the difference to the power plant; alternatively, if the power plant’s actual revenue from the PJM sales is more than the fixed price, the power plant will pay the difference to the EDC(s). Settlement between the power plant and the EDC(s) would occur monthly. *Id.* The EDCs issued, without objection, the Amended RFP as directed and received bids.

³ In addition to BGE, Pepco, and Delmarva, the notice was sent to Potomac Edison Company, Maryland’s fourth electric distribution company, who is not a party in the case at bar.

⁴ PJM Interconnection, LLC, “a regional transmission organization that coordinates the movement of wholesale electricity in all or parts of 13 states and the District of Columbia.” *About PJM*, PJM.COM, <http://www.pjm.com/about-pjm.aspx> (last visited Sept. 6, 2013). Maryland is one of those 13 states. *Id.*

⁵ The Southwest Mid-Atlantic Area Council (“SWMAAC”) is a geographic area consisting of Central Maryland, Southern Maryland, and the District of Columbia.

Twenty parties filed comments concerning the need for new generation and fourteen of those parties testified, and were examined by the Commission, at the January 31, 2012, hearing. The EDCs participated in the hearing with no objection to the Commission's authority to conduct the investigation, hold the hearing, or issue the RFP. (Order No. 84815 3). On April 12, 2012, the Commission issued Order No. 84815:

[W]e find that the long-term demand for electricity in Maryland, and specifically in the SWMAAC zone, compels us to order new generation in the amount of 650 to 700 [Megawatts] in the SWMAAC zone in Maryland by 2015. We find that the Bid of [CPV] to build a 661 MW natural gas-fired combined cycle facility in Charles County with an in-service date of June 1, 2015 will provide the needed new generation at the lowest cost to SOS ratepayers, and we accept that bid. We direct BGE, Pepco and Delmarva to negotiate and enter into a Contract for Differences with [CPV], and to recover their costs (or return their credits) through the SOS surcharge.

Id. at 29. Regarding the issue of cost recovery, the Commission wrote, "We are mindful of the concerns the [EDCs] expressed about the requirements of the [CfD] . . . and direct Boston Pacific, CPV, BGE, Pepco, and Delmarva to negotiate appropriate changes in the [CfD] and submit any proposed changes to the Commission for approval." *Id.* at fn. 152. Boston Pacific Company, Inc. ("Boston Pacific") served as the Commission's consultant during the investigation and testified at the January 31, 2012, hearing. *Id.* at 3.

Calpine, the OPC, and the EDCs (collectively, "Petitioners") each filed Petitions for Judicial Review of Order No. 84815. (Docket #00001000). On August 9, 2012, the Circuit Court of Maryland for Baltimore City ("Circuit Court") issued an order to consolidate these petitions. (Docket #00009001).

As required by the Commission's Order No. 84815, the EDCs, CPV, and Boston Pacific engaged in negotiations regarding the CfD. (Order No. 85501 1). Comments were filed, and the Commission subsequently held hearings on July 31, 2012, and November 26, 2012, concerning the recommended amendments to the CfD. *Id.* at 2. On April 16, 2013, the Commission issued

Order No. 85501, which approved a final form of the CfD and ordered the EDCs to execute it. Petitioners each filed Petitions for Judicial Review of Order No. 85501. On June 26, 2013, the Circuit Court issued an order to consolidate these petitions with the previous petitions. (Docket #0002001).

The arguments raised by the Petitioners are condensed as follows:

- (1) The Commission acted outside of its statutory authority when issuing Order Nos. 84815 and 85501.⁶
- (2) The Commission's Order Nos. 84815 and 85501 are a result of unlawful procedure.
- (3) The Commission's Orders Nos. 84815 and 85501 are arbitrary and capricious and not supported by substantial evidence in the record.

(Docket #00022000, 00024000, 00025000, 00039000, 00040000, 00041000). The Commission, CPV, and the OPC⁷ filed responses to the Petitions for Judicial Review opposing the arguments raised by Petitioners. (Docket #00031000, 00032000, 00035000, 00038000). Maintaining their earlier positions, Petitioners each filed replies to the responses. (Docket #00039000, 00040000, 00041000).

II. HISTORICAL BACKGROUND

Before 1999, each of Maryland's EDCs enjoyed a monopoly over providing electricity to customers in its respective service area. Each EDC supplied both the commodity (i.e., generated the electricity) and the service (i.e., distributed the electricity through poles, wires, and cables). In return, the EDCs were subject to the Commission's "pervasive" supervision and regulation. *Delmarva Power & Light Co. v. Pub. Serv. Comm'n of Md.*, 370 Md. 1, 5-7 (2002). *See also* Carville B. Collins, *To Regulate or Not to Regulate That Is the Electricity Question*, MD. B.J.,

⁶ While all three of the Petitioners raise this argument, Petitioner OPC does not challenge the Commission's authority to direct the EDCs to enter into the CfD with CPV but instead, challenges only the Commission's authority to assign responsibility for the cost of the CfD to SOS customers alone. (Mem. of Pet'r OPC 11-16).

⁷ The Answering Memorandum of the OPC addressed Calpine and the EDCs' claim that the Commission lacked statutory authority to issue the orders. (Docket #00032000).

Sept./Oct. 2010, at 4, 5 (“[F]or many years, electricity was generated, distributed and sold by Maryland’s electric companies to Maryland consumers in a *fully* regulated market. The electric companies recovered their demonstrated, prudently-incurred costs of providing these services . . . plus a reasonable margin or return, *all as reviewed and determined* by the [Commission].”) (emphasis added).

In 1999, the Maryland General Assembly enacted the Electric Customer Choice and Competition Act (“ECCCA”) to facilitate the restructuring of the electric utility industry to allow for retail electric competition. MD. CODE ANN., PUB. UTIL. § 7-501, *et seq.* A primary feature of the ECCCA was the detachment of the two component parts of the electricity package; in other words, the generation of electricity and the distribution of electricity were unbundled, resulting in two separately identified and billed commodities. The General Assembly described its purpose in enacting the ECCCA:

- The General Assembly finds and declares that the purpose of this subtitle is to:
- (1) establish customer choice of electricity supply and electricity supply services;
 - (2) create competitive retail electricity supply and electricity supply services markets;
 - (3) deregulate the generation, supply, and pricing of electricity;
 - (4) provide economic benefits for all customer classes; and
 - (5) ensure compliance with federal and State environmental standards.

MD. CODE ANN., PUB. UTIL. § 7-504. The distribution of electricity remained a monopoly of the EDCs, but for the first time, non-utility companies were able to compete with the EDCs for the supply, marketing, and sale of electricity. Customers were provided with the option to purchase electricity generated by other companies and have it delivered over the distribution lines of their local EDC. Alternatively, customers could remain, by default, with their local EDC as the supplier of their electricity under SOS.

The restructuring mandated by the ECCCA was subject to the oversight and regulation of the Commission:

(a) (1) In assessing and approving each electric company's⁸ restructuring plan, and overseeing the transition process and regulation of the restructured electric industry, the Commission shall provide that the transition to a competitive electricity supply and electricity supply services market shall be orderly, maintain electric system reliability, and ensure compliance with federal and State environmental regulations, be fair to customers, electric company investors, customers of municipal electric utilities, electric companies, and electricity suppliers, and provide economic benefits to all customer classes.

...

(c) (1) Notwithstanding any other provision of law, including subsection (d) of this section, the Commission may regulate the regulated services of an electric company through alternative forms of regulation.

(2) The Commission may adopt an alternative form of regulation under this section if the Commission finds, after notice and hearing, that the alternative form of regulation:

- (i) protects consumers;
- (ii) ensures the quality, availability, and reliability of regulated electric services; and
- (iii) is in the interest of the public, including shareholders of the electric company.

(3) Alternative forms of regulation may include:

- (i) price regulation, including price freezes or caps;
- (ii) revenue regulation;
- (iii) ranges of authorized return;
- (iv) rate of return;
- (v) categories of services; or
- (vi) price-indexing.

...

(e) (1) The Commission shall assess the amount of electricity generated in Maryland as well as the amount of electricity imported from other states in order to determine whether a sufficient supply of electricity is available to customers in the State.

....

MD. CODE ANN., PUB. UTIL. § 7-505. Moreover, the ECCCA's mandated restructuring had the effect of altering the Commission's traditional authority of "pervasive" regulation:

⁸ "Electric company" means a person who physically transmits or distributes electricity in the State to a retail electric customer. MD. CODE ANN., PUB. UTIL. § 1-101(h)(1). The EDCs are electric companies. CPV is not an electric company.

- (a) (1) On and after the initial implementation date, the generation, supply, and sale of electricity, including all related facilities and assets, may not be regulated as an electric company service or function except to:
- (i) establish the price for standard offer service under § 7-510(c) of this subtitle;
 - and
 - (ii) review and approve transfers of generation assets under § 7-508 of this subtitle.

MD. CODE ANN., PUB. UTIL. § 7-509.

The ECCCA further decreed that during the transition to a competitive market, rates would be reduced and capped to allow for the change. However, the low rates hindered competition from entering the market. When the transition period (which ranged from five to nine years, depending on the area of Maryland) was coming to an end, the market price of electricity was sharply higher than the mandated reduced and capped rates. Thus, customers faced a significant increase in the price of their electricity (e.g., BGE residential customers faced an average annual increase of 72% starting on July 1, 2006). MD. DEP'T OF LEGISLATIVE SERVS., THE ROAD TO RESTRUCTURING IN MARYLAND 14-15 (2006).

Realizing that the restructuring mandated by the ECCCA had not produced many of the expected benefits, the General Assembly enacted material amendments to the ECCCA in 2006. Most significant to the issues presented here is amended § 7-510, which, *inter alia*, extended indefinitely the EDCs' obligation to provide SOS to their customers. MD. CODE ANN., PUB. UTIL. § 7-510(c)(3). As to the obligation to provide SOS, § 7-510 further directs:

- (c) (4) (ii) 1. Under the obligation to provide standard offer service in accordance with paragraph (3)(ii) of this subsection, the Commission, by regulation or order, and in a manner that is designed to obtain the best price for residential and small commercial customers in light of market conditions at the time of procurement and the need to protect these customers from excessive price increases: . . .
 - B. may require or allow an investor-owned electric company to procure electricity for these customers directly from an electricity supplier through one or more bilateral contracts outside the competitive process.
- 2. A. As the Commission directs, the competitive process shall

include a series of competitive wholesale bids in which the investor-owned electric company solicits bids to supply anticipated standard offer service load for residential and small commercial customers as part of a portfolio of blended wholesale supply contracts of short, medium, or long terms, and other appropriate electricity products and strategies, as needed to meet demand in a cost-effective manner.

...
(c) (6) In order to meet long-term, anticipated demand in the State for standard offer service and other electricity supply, the Commission may require or allow an investor-owned electric company to construct, acquire, or lease, and operate, its own generating facilities, and transmission facilities necessary to interconnect the generating facilities with the electric grid, subject to appropriate cost recovery.
....

MD. CODE ANN., PUB. UTIL. § 7-510(c).

III. STANDARDS OF REVIEW

A. Administrative Agency Scope of Review

i. Factual Findings and Conclusions of Law

This Court is required to review a decision of an administrative agency both on the law and the evidence. *Balt. Lutheran High Sch. Ass'n, Inc. v. Emp't Sec. Admin.*, 302 Md. 649, 662 (1985). However, the scope of review this Court may exercise over the review of a decision of an administrative agency is narrow in recognition of the expertise of the agency in the particular area. *Mayor of Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 395 (1979). As such, this Court's statutory powers of review generally go very little beyond its inherent power of review to prevent illegal, unreasonable, arbitrary or capricious administrative action. *Harford Mem'l Hosp. v. Health Servs. Cost Review Comm'n*, 44 Md. App. 489, 506 (1980). This Court is "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Emp. Ret. Sys. of Balt. v. Dorsey*, 430 Md. 100, 110 (2013).

Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Caucus Distribs., Inc. v. Md. Sec. Comm'r*, 320 Md. 313, 324 (1990). Accordingly, the reviewing court “decides whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.” *Dorsey*, 430 Md. at 110. In applying the substantial evidence test, this Court must view the decision in the light most favorable to the agency because “decisions of administrative agencies are prima facie correct and carry with them a presumption of validity.” *Bd. of Educ. of Montgomery Cnty. v. Paynter*, 303 Md. 22, 35-36 (1985). Further, it is “the province of the agency to resolve conflicting evidence, [and] where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inferences.” *Id.* at 36. The court may not substitute its judgment for the expertise of the agency. *Motor Vehicle Admin. v. Lindsay*, 309 Md. 557, 564 (1987). The burden is on those who seek to set aside an agency decision on appeal to show by clear and satisfactory evidence that there is illegality or unreasonableness in the agency’s decision. *Office of People’s Counsel v. Md. Pub. Serv. Comm’n*, 355 Md. 1, 32 (1999).

This Court must determine whether an administrative agency made an error of law. *Balt. Lutheran*, 302 Md. at 662. Although a certain amount of deference may be afforded to an agency’s conclusions of law when the agency is interpreting or applying the statute it itself administers, this Court is under no constraint to affirm an agency decision premised solely upon an erroneous conclusion of law. *Dorsey*, 430 Md. at 111; *Dep’t of Human Res., Balt. City Dep’t of Soc. Servs. v. Hayward*, 426 Md. 638, 650 (2012); *Thomas v. State Ret. & Pension Sys. of Md.*, 420 Md. 45, 54-55 (2011).

ii. Quasi-Judicial Versus Quasi-Legislative Actions

The standard of review applied to an action of an administrative agency is dependent

upon whether that action may be classified as quasi-judicial or quasi-legislative. The Court of Appeals explained:

[W]hether a given act is quasi-judicial in nature is guided by two criteria: (1) the act or decision is reached on individual, as opposed to general, grounds, and scrutinizes a single property; and (2) there is a deliberative fact-finding process with testimony and the weighing of evidence. The *Armstrong III* court emphasized the fact-finding process as the most weighty criterion.

Md. Overpak Corp. v. Mayor of Baltimore, 395 Md. 16, 33 (2006) (citations omitted). In 2012, the Court of Appeals reaffirmed this standard:

[A]n agency acts in a quasi-judicial function when “(1) the act or decision is reached on individual, as opposed to general, grounds, and scrutinizes a single property . . . and (2) there is a deliberative fact-finding process with testimony and the weighing of evidence.” Normally, that requires a contested case hearing, so that evidence (as opposed to informal statements of general beliefs) may be presented, challenged, and analyzed, in order that reasonable credibility determinations can be made.

Md. Bd. of Pub. Works v. K. Hovnanian’s Four Seasons at Kent Island, LLC, 425 Md. 482, 515 (2012) (quoting *Md. Overpak*, 395 Md. at 33) (citing *Armstrong v. Mayor of Baltimore*, 169 Md. App. 655 (2006)). As to the second factor, the fact-finding process, the Court of Appeals described that “adjudicative facts concern questions of who did what, where, when, how, why, and with what motive or intent, while legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.” *Talbot Cnty. v. Miles Point Prop., LLC*, 415 Md. 372, 387-88 (2010) (internal quotation marks omitted).

Judicial review of an administrative agency’s quasi-judicial functions is encompassed within the usual arbitrary and capricious standard of purely discretionary actions. *Judy v. Schaeffer*, 331 Md. 239, 265 (1993) (concluding that “when an agency is acting in a capacity that is quasi-judicial, the courts review the appealed conclusions by determining whether the

contested decision was rendered in an arbitrary, capricious, or oppressive manner”). With regards to quasi-legislative administrative action, the Court of Special Appeals, after synthesizing various similar, but non-identical standards of judicial review, distilled the following rule: “We do not consider whether the agency’s decision was arbitrary, capricious or unsupported by substantial evidence Rather, we decide whether the agency was acting within its legal boundaries.” *Lewis v. Gansler*, 204 Md. App. 454, 482 (2012), *cert. denied*, 427 Md. 609 (2012) (internal quotation marks omitted). The scope of judicial review of quasi-legislative actions is limited to “(a) whether quasi-legislative responsibilities have been properly granted to the agency, and (b) whether those responsibilities have been carried out in accordance with traditional standards of procedural and substantive fair play.” *Oyarzo v. Dept. of Health*, 187 Md. App. 264, 288 (2009). Thus, once a reviewing court is satisfied “that the agency was acting within the scope of its authority and not otherwise contrary to law,” its review ends. *Lewis*, 204 Md. App. at 483. This standard of judicial review of administrative agency action is the narrowest in scope and most deferential to the agency. *See Armstrong*, 169 Md. App. at 668 (explaining that “a quasi-legislative decision is also subject to court review,” but “[u]nlike ordinary statutory and nonstatutory judicial review of administrative decisions, legislative actions are subject to much more limited review”).

B. Statutory Construction

Whether an agency action is in compliance with law, or arbitrary and capricious and contrary to law, requires a court to interpret the meaning of the applicable law governing the action. The cardinal rule of statutory interpretation is to ascertain and effectuate the real and actual intent of the Legislature. *Lockshin v. Semsker*, 412 Md. 257, 274 (2010). The first step in ascertaining the legislative intent is to look at the language of the statute, giving it its natural and

ordinary meaning. *Md.-Nat'l Capital Park & Planning Comm'n v. Anderson*, 395 Md. 172, 182 (2006). When the statutory language is clear, courts do not need to look beyond the statutory language to determine the Legislature's intent. *Id.* However, if the language of the statute is ambiguous (i.e., subject to more than one interpretation), then courts endeavor to resolve ambiguities by looking beyond the statutory language; for example, courts look to legislative history, case law, statutory purpose, and the structure of the statute. *Barbre v. Pope*, 402 Md. 157, 173 (2007); *Anderson v. Council of Unit Owners of Gables on Tuckerman Condo.*, 404 Md. 560, 572 (2008).

When the statutory language is ambiguous, courts consider the literal or usual meaning of the words and their meaning and effect in light of the setting, the objectives, and purpose of statute. *Md.-Nat'l Capital Park*, 395 Md. at 182. When the statute is part of a larger statutory scheme, "it is axiomatic that the language of a provision is not interpreted in isolation." *Anderson v. Council*, 404 Md. at 572. Instead, courts "analyze the statutory scheme as a whole considering the purpose, aim, or policy of the enacting body and attempt to harmonize provisions dealing with the same subject so that each may be given effect." *Id.* (internal quotation marks omitted). *See also Koste v. Oxford*, 431 Md. 14, 26 (2013) ("We presume that the Legislature intends its enactments to operate together as a consistent and harmonious body of law, and, thus, we seek to reconcile and harmonize the parts of a statute, to the extent possible consistent with the statute's object and scope."). Furthermore, in construing a statute, courts "seek to avoid constructions that are illogical, unreasonable, or inconsistent with common sense." *Frost v. State*, 336 Md. 125, 137 (1994).

IV. ANALYSIS

A. The Commission's Authority

The Commission, being a legislatively created body, must find authority for its actions in Maryland statutes. *Chesapeake & Potomac Tel. Co. of Md. v. Md./Del. Cable Television Ass'n, Inc.*, 310 Md. 553, 560 (1987). To the full extent allowable by the Constitution and laws of the United States, the Commission has jurisdiction over each EDC that engages in or operates a business in Maryland. MD. CODE ANN., PUB. UTIL. § 2-112. The Commission has the powers specifically conferred to it by law and additionally, the implied and incidental powers needed or proper to carry out its functions. *Id.*

The Commission has general powers and duties with respect to supervising and regulating the EDCs:

- (a) (1) The Commission shall:
 - (i) supervise and regulate the public service companies subject to the jurisdiction of the Commission to:
 - 1. ensure their operation in the interest of the public; and
 - 2. promote adequate, economical, and efficient delivery of utility services in the State without unjust discrimination; and
 - (ii) enforce compliance with the requirements of law by public service companies, including requirements with respect to financial condition, capitalization, franchises, plant, manner of operation, rates, and service.
 - (2) In supervising and regulating public service companies, the Commission shall consider the public safety, the economy of the State, the conservation of natural resources, and the preservation of environmental quality.
- (b) The powers and duties listed in this title do not limit the scope of the general powers and duties of the Commission provided for by this division.

MD. CODE ANN., PUB. UTIL. § 2-113. Further, the Commission has the authority to adopt regulations prescribing standards for the EDCs:

- (a) After providing notice and an opportunity for interested parties to be heard, the Commission may adopt regulations that prescribe standards for safe, adequate,

reasonable, and proper service for any class of public service company⁹ or gas master meter operator.

(b) The standards adopted under subsection (a) of this section shall best promote, in the opinion of the Commission, the security or convenience of:

- (1) the public;
- (2) those employed in furnishing services; and
- (3) those to whom services are rendered.

(c) The Commission may:

- (1) enforce the standards adopted under this section; and
- (2) by order, as the Commission considers necessary, require changes and additions in the service of any public service company or gas master meter operator, including:
 - (i) repairs or improvements in plant;
 - (ii) increase in motive power; and
 - (iii) change in schedule or manner of operations.

MD. CODE ANN., PUB. UTIL. § 5-101.

Additionally, as noted *supra*, the Commission has the authority to ensure the availability of SOS by requiring procurement of electricity through contracts and/or requiring construction of generating facilities. MD. CODE ANN., PUB. UTIL. § 7-510(c).

“The Commission is charged with ensuring that all of the residents in this State receive adequate and reliable electric service at just and reasonable rates.” *Town of Easton v. Pub. Serv. Comm’n of Md*, 379 Md. 21, 41 (2003). *See also* MD. CODE ANN., PUB. UTIL. § 2-113. It is well-settled that the Commission’s authority with respect to the public service companies subject to its jurisdiction is “very broad.” *General Motors Corp. v. Pub. Serv. Comm’n of Md*, 87 Md. App. 321, 336 (1991); *Bell Atl. of Md., Inc. v. Intercom Sys. Corp.*, 366 Md. 1, 18 (2001) (“[T]he General Assembly vested the Commission with broad supervisory and regulatory powers.”); MD. CODE ANN., PUB. UTIL. § 2-113(b). Moreover, the Commission’s powers must be construed

⁹ “Public service company” means a common carrier company, electric company, gas company, sewage disposal company, telegraph company, telephone company, water company, or any combination of public service companies. MD. CODE ANN., PUB. UTIL. § 1-101.

liberally, allowing the Commission to take any action needed or proper to carry out its functions. MD. CODE ANN., PUB. UTIL. § 2-112; *Bell Atl. of Md.*, 366 Md. at 19.

The Court of Appeals in *Chesapeake & Potomac Tel. Co. of Maryland v. Md./Del. Cable Television Ass'n, Inc.*, examining the language of § 2-113 in relation to the Commission's attempt to govern the rates, terms, and conditions of pole attachment agreements between utility companies and cable television companies, described:

[W]e agree with the [Commission] that utility poles are essential to the delivery of telephone and electric service and that the [Commission] is empowered to regulate the use of such poles to ensure reliable service and to protect the public safety. Nevertheless, we fail to understand how the regulation of the *rates* of pole attachment agreements is necessary to ensure safe and reliable utility service to the public. Furthermore, we fail to perceive any relation between the price a cable television company pays to attach its cable to a utility pole and the "efficient delivery of utility services," "public safety," and "the preservation of environmental quality."

310 Md. 553, 561 (1987) (emphasis in original). Here, unlike in *Chesapeake*, the Commission's orders directing the EDCs to enter into a CfD with CPV is directly related to ensuring reliable service and protecting the public safety. *Id.*

Furthermore, the Commission is given the authority to adopt regulations that prescribe standards for safe, adequate, reasonable, and proper service for a public service company and to enforce those standards. MD. CODE ANN., PUB. UTIL. § 5-101. The Commission has adopted a regulation with regards to the service supplied by electric companies. The generating capacity of an electric utility's plant "shall be sufficiently large to meet all normal demands for service and provide a reasonable reserve for emergencies." COMAR¹⁰ 20.50.02.03. Thus, the Commission's Order Nos. 84815 and 85501, directing the EDCs to enter into a CfD with CPV in order to provide "the needed new generation at the lowest cost to SOS ratepayers," fits within its broad supervisory and regulatory powers of ensuring the EDCs furnish services that are "safe,

¹⁰ Code of Maryland Regulations.

adequate, just, reasonable, economical, and efficient.” *Bell Atl. of Md.*, 366 Md. at 18. *See also* MD. CODE ANN., PUB. UTIL. § 2-113.

Given the somewhat complex historical background of the statutory authority at issue, an analysis beyond the statutory language is appropriate. *Barbre*, 402 Md. at 173. Two statutes in particular, §§ 7-509(a) and 7-510(c), create a need for further discussion.

Section 7-509 states:

(a) (1) On and after the initial implementation date, the generation, supply, and sale of electricity, including all related facilities and assets, may not be regulated as an electric company service or function except to:

- (i) establish the price for standard offer service under § 7-510(c) of this subtitle; and
- (ii) review and approve transfers of generation assets under § 7-508 of this subtitle.

....

MD. CODE ANN., PUB. UTIL. § 7-509(a).

Neither of the two exceptions noted above apply to the case at bar. Section 7-509(a) does not deprive the Commission of the authority to issue Order Nos. 84815 and 85501. Section 7-509(a) must not be interpreted in isolation but instead as a part of a whole and with consideration given to the purpose, aim, and/or policy of the General Assembly. *Anderson v. Council*, 404 Md. at 572. This Court presumes that the Legislature intended § 7-509(a) to operate consistently and harmoniously with the other sections of the ECCCA and avoids construing this section in a manner that proves illogical, unreasonable, or inconsistent with common sense. *Koste*, 431 Md. at 26; *Frost*, 336 Md. at 137. The Court of Appeals, discussing conflicting statutes, stated:

[T]he law does not favor repeals by implication. Thus, we have said that a repeal by implication does not occur unless the language of the later statute plainly shows that the legislature intended to repeal the earlier statute. Generally, therefore, a later statute will not be held to repeal an earlier statute by implication unless there is some express reference to the earlier statute.

State v. Harris, 327 Md. 32, 39 (1992) (citations omitted). Here, there is no repeal by implication.

Therefore, while the ECCCA sought to provide customers with choice as to their electricity supplier and this resulted in a limitation on the Commission's traditional "pervasive" regulation, the legislative history does not indicate that the Legislature acted with a purpose, aim, or policy of repealing earlier statutes and divesting the Commission of its broad authority to "supervise and regulate" the EDCs to "ensure their operation in the interest of the public" and "promote adequate, economical, and efficient delivery of utility services." MD. CODE ANN., PUB. UTIL. § 2-113; 7-504. In fact, § 7-505 demonstrates that the Commission was to "assess" and "approve" each EDC's restructuring plan, "oversee" the transition process and regulation of the restructured electric industry, and "regulate" through alternative forms of regulation. MD. CODE ANN., PUB. UTIL. § 7-505. Moreover, the ECCCA made no changes to §§ 2-113 and 5-101, *supra*, which describe the Commission's broad supervisory and regulatory powers. The 2006 amendments did not address the Commission's authority to ensure and promote safety, adequacy, and reliability, and efficiency. Section 5-101, *supra*, was unchanged, and § 2-113, *supra*, was re-enacted without amendment.

Section 7-510, which was substantially amended in 2006, extended the availability of SOS and authorized the Commission to require certain actions in order to accommodate the extension. MD. CODE ANN., PUB. UTIL. § 7-510. Under its obligation to provide SOS, the Commission may, by order, require an investor-owned electric company to procure electricity for SOS customers through bilateral contracts outside of the competitive process. At the Commission's direction, the competitive process may include a series of bids for the supply of SOS solicited by the investor-owned electric companies "as part of a portfolio of blended

wholesale supply contracts for short, medium, or long terms, and other appropriate electricity products and strategies, as needed to meet demand in a cost-effective manner.” MD. CODE ANN., PUB. UTIL. § 7-510(c)(4)(ii)(2)(A).

The Commission additionally may require an investor-owned electric company to “construct, acquire, or lease, and operate, its own generating facilities . . . subject to appropriate cost recovery.” MD. CODE ANN., PUB. UTIL. § 7-510(c)(6). The Commission contends that this section provides it with the authority to require investor-owned electric companies to do the following: (1) construct generating facilities; (2) acquire generating facilities; (3) lease generating facilities; and (4) operate their own generating facilities. (Am. Mem. of Resp’t Comm’n 9). The Commission concludes that it accordingly had the authority to require the EDCs “to acquire a new generating facility by financing its construction through an agreement such as the CfD.” *Id.* In contrast, Petitioners aver:

Neither the Orders nor the CfD require the Utilities to construct, acquire, or lease a generating facility. Nor do they contemplate the Utilities “operating” a generating facility. In fact, the CfD specifically provides that the Utilities will *not* construct, acquire, or lease and operate the power plant. Instead, the power plant will be constructed, owned and operated by CPV, a private developer.

(Mem. of Pet’r EDCs 15. *See also* Mem. of Pet’r Calpine 16). As it is subject to more than one meaning, § 7-510(c) is ambiguous; therefore, this Court must apply the aforementioned rules of statutory construction. Not having produced many of the benefits expected by the General Assembly, § 7-510 of the ECCCA was amended in 2006 to extend the EDCs obligation of providing their customers with SOS and to provide the Commission with guidance on handling the extension. At a minimum, it is clear the Commission has authority to require the EDCs to construct, acquire, lease, or operate a generating facility. Considering § 7-510(c) as part of a larger statutory scheme,

presuming harmony within the ECCCA, and avoiding an illogical construction, this Court determines that § 7-510(c) does not deprive the Commission of the authority to issue Order Nos. 84815 and 85501. As such, the Commission's orders directing the EDCs to negotiate and enter into a CfD with CPV and to recover their costs, or return their credits, through the SOS were within its statutory authority.

B. Administrative Procedure of the Commission

“The Commission shall initiate and conduct any investigation necessary to execute its powers or perform its duties under this division.” MD. CODE ANN., PUB. UTIL. § 2-115. Similarly, “[t]he Commission shall institute and conduct proceedings reasonably necessary and proper to the exercise of its powers or the performance of its duties.” *Id.* at § 3-104. The Commission must conduct its proceedings en banc or in panels of either at least three commissioners or at least two commissioners and a hearing examiner. *Id.*

One type of proceeding through which the Commission may exercise its power and/or perform its duties is a generic proceeding. *Delmarva Power & Light Co.*, 370 Md. 1, 29 (2002).

The Court of Appeals described a generic proceeding:

[I]s, and long has been, commonly used by regulatory agencies like the [Commission] either to investigate some general matter subject to its jurisdiction or to gather facts and opinion in furtherance of its policy-setting function. That function could, in some instances, be carried out through adjudicatory proceedings involving a single utility, but when the matter involves the rights or interests of several utilities, the generic proceeding can be more efficient, in that it allows all interested groups to participate in the policy development at the same time. The generic proceeding is predominantly quasi-legislative, rather than quasi-judicial, in nature. Interested persons, often including persons who may not be directly subject to the jurisdiction of the Commission or to any policy directive that emanates from the proceeding, are invited to participate and to offer data, opinion, and argument. The information is usually provided in the form of either documents or written or oral statements rather than sworn testimony subject to cross-examination. The parties do not ordinarily have the right of “discovery.” Such a proceeding would most likely run afoul of some of the procedural requirements applicable to a contested-case proceeding under the APA (which do

not apply to the [Commission] in any event), but it does not, of itself, contradict any of the requirements for the adoption of regulations or for the adoption of policy directives that, for whatever reason, need not be in the form of regulations.

Id. at 30.

Furthermore, “[t]he Commission is not bound by the rules of evidence or procedure of any court.” MD. CODE ANN., PUB. UTIL. § 3-101. Instead, the rules and procedure to be followed by the Commission is governed largely by statute. *Montgomery Cnty. v. Pub. Serv. Comm’n*, 203 Md. 79, 88 (1953). “[W]hen the Legislature prescribes the procedure for proceedings before the Commission, that procedure must be followed, [and] [w]hen the Commission acts in a capacity at least quasi-judicial, it should act under rules of procedure provided either by the Legislature or by itself.” *Id.* For example, parties in a proceeding before the Commission have certain rights with respect to witnesses, evidence, and arguments:

In addition to any other right a party in a proceeding before the Commission may be entitled to, the party may:

- (1) summon witnesses, present evidence, and present argument;
- (2) conduct cross-examination and submit rebuttal evidence; and
- (3) take depositions in or outside of the State, subject to regulation by the Commission to prevent undue delay, and in accordance with the procedure provided by law or rule of court with respect to civil actions.

MD. CODE ANN., PUB. UTIL. § 3-107.

Although administrative agencies are not bound by the technical rules of evidence or procedure of any court, “they must observe the basic rules of fairness as to the parties appearing before them.” *Cecil Cnty. Dep’t of Soc. Servs. v. Russell*, 159 Md. App. 594, 612 (2004). While “[p]rocedural due process in administrative law is recognized to be a matter of greater flexibility than that of strictly judicial proceedings,” an administrative proceeding must be “fundamentally fair to the parties.” *Id.* at 612, 613. Thus, in evaluating whether due process was afforded, a court is required to examine the “the totality of the procedures afforded rather than the absence

or presence of particularized factors.” *Id.* at 613. *See also Bragunier Masonry Contractors, Inc. v. Md. Com’r of Labor & Indus.*, 111 Md. App. 698, 712-13 (1996) (“[D]ue process does not require adherence to any particular procedure. . . . [T]he level of due process required must be decided under the facts and circumstances of each case.”).

The minimum due process required where a deprivation of a property interest is involved is that the deprivation be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Bragunier*, 111 Md. App. at 712. The United States Supreme Court in *Mathews v. Eldridge* set forth the factors to be considered when addressing procedural due process in an administrative setting:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335 (1976).

The proceedings conducted by the Commission in this matter did not violate the process due to Petitioners. *Delmarva Power & Light Co.*, 370 Md. at 30; MD. CODE ANN., PUB. UTIL. § 3-104. The Commission provided notice to all interested parties that it would investigate all options, including a CfD, to ensure an adequate and reliable supply of electricity to Maryland customers. *Mathews*, 424 U.S. at 335. The Commission encouraged, received, and considered filings from thirty sophisticated parties, including Petitioners, who intervened in the matter. *Id.* The Commission did not prevent any party from providing information the party deemed relevant. The Commission conducted multiple hearings and subjected the fourteen witnesses to its own cross-examination. *Id.* Petitioners participated at the hearings. *Id.*

The process was more efficient than adjudicatory proceedings given that the area of concern involved the rights and interests of multiple public service companies and it allowed all of these parties to participate. *Delmarva Power & Light Co.*, 370 Md. at 30.

C. Substantial Evidence

The Commission relies on a series of uncontested variables for its determinations. It observes that coal-fired power plants in Maryland risk being forced into premature retirement as a result of having to accommodate new environmental regulations. (Am. Mem. of Resp't Comm'n 31). Further, it says that the PJM region has increasingly relied on demand response resources, which risk non-performance, to fill generation capacity shortfalls. *Id.* at 30, 34. By 2022, according to the Commission, Maryland's Renewable Energy Portfolio Standard will require that 20% of energy sold in the state come from Tier 1 renewable resources, whose intermittent characteristics require conventional energy sources as support in order to ensure stable voltage and frequency regulation. *Id.* at 35. *See also* MD. CODE ANN., PUB. UTIL. §§ 7-703(b), 7-701(r). Additionally, PJM's Reliability Pricing Model, designed to attract needed investments in reliability in the PJM region,¹¹ has consistently failed to incentivize construction of new power plants. (Am. Mem. of Resp't Comm'n 36). Moreover, the SWMAAC zone has limited transmission capability to import generation capacity, which has led to high prices for generation capacity in the zone. *Id.* at 44. The reserve margin for the zone has been negative and on a downward trend for several years. *Id.* at 45.

¹¹ "The Reliability Pricing Model (RPM) is PJM's capacity-market model. Implemented in 2007, the RPM, based on making capacity commitments three years ahead, is designed to create long-term price signals to attract needed investments in reliability in the PJM region. The long-term RPM approach, in contrast to PJM's previous short-term capacity market, includes incentives that are designed to stimulate investment both in maintaining existing generation and in encouraging the development of new sources of capacity." *Reliability Pricing Model*, PJM.COM, <http://www.pjm.com/markets-and-operations/rpm.aspx> (last visited Sept. 20, 2013).

In response, Petitioners assert that the Commission failed to properly consider how transmission system upgrades could have resolved reliability problems. (Mem. of Pet’r EDCs 28). However, the Commission, relying on the Federal Power Act, remarks that it may approve an application to construct the Maryland portion of a regional transmission line, but it has no authority to order construction of transmission lines outside of Maryland or approve regional cost recovery for any portion of a transmission line. (Am. Mem. of Resp’t Comm’n 40). The Commission reports that natural gas-fired generation provides numerous benefits to Maryland that transmission does not. *Id.* at 41.

Petitioner Calpine, who owns a power plant outside of the SWMAAC, claims that the Commission acted arbitrarily and capriciously by excluding proposals for construction of generation facilities located outside of the zone. (Mem. of Pet’r Calpine 19). To that point, the Commission commented that the SWMAAC is an area that has been identified as “constrained” due to its limited ability to import generation capacity into the zone and that “a power plant outside of the zone, even one just outside of its borders, may not be able to produce the same reliability benefits as a plant inside [of the zone].” (Am. Mem. of Resp’t Comm’n 43). The Commission also noted that Calpine’s power plant is located in Pennsylvania, and therefore, construction and operation of such a plant is dependent on receiving certification and permits from Pennsylvania’s state and local governments, upon which Maryland cannot rely. *Id.* at 44.

Maryland’s fourth electric distribution company¹² was not included in the CfD because it is situated west of the Allegheny Mountains, a substantial transmission constraint that prevents full transmission of electricity from Western Maryland to the central and eastern portions of Maryland. *Id.* at 52. In contrast, the service territories of the EDCs are not bifurcated by the western constraint; thus, the Commission concludes that their customers will benefit from the

¹² The Potomac Edison Company, doing business as Allegheny Power.

reliability improvements and potential diminution in energy prices resulting from the CfD. *Id.* at 54. Furthermore, Boston Pacific, who evaluated the bids submitted for the Commission, found that CPV's bid was the least-cost option and provided the greatest benefit to Maryland customers.¹³ *Id.* at 47, 49-51.

The EDCs requested that the CfD include a provision, generally known as a "regulatory out," which would condition the EDCs payment obligations to CPV on the ongoing effectiveness of a Commission order authorizing the EDCs' cost recovery. (Mem. of Pet'r EDCs 31). The Commission decided not to include the provision because it was not in the CfD that was the basis for CPV's bid and its inclusion would significantly increase the cost of financing the new power plant. (Am. Mem. of Resp't Comm'n 60).

The Commission found that cost recovery through the SOS surcharge was appropriate on the grounds that the SOS customers will receive reliability benefits from the new generation. (Order No. 84815 27). In addition, it asserts that there is a likelihood of a net credit over the life of the CfD. Indeed, the surcharge is projected to become a credit for SOS customers in approximately five years when the revenue received by CPV exceeds the fixed price contained in the CfD. (Order No. 84815 27; Am. Mem. of Resp't Comm'n fn. 185).

The evidence provided to the Commission was substantial to support its issuance of Order Nos. 84815 and 85501. *Dorsey*, 430 Md. at 110. As such, the Commission's orders are not illegal, unreasonable, arbitrary, or capricious. *Harford Mem'l Hosp.*, 44 Md. App. at 506. This Court will not disturb the Commission's decision to issue Order Nos. 84815 and 85501.

¹³ In its draft RFP, the Commission set out the requirements for bid submission and the criteria that would be used to evaluate and ultimately select the "winning" bid. (Am. Mem. of Resp't Comm'n 47-48). Boston Pacific's evaluation, which articulated the reasons for its findings, was filed in the case. *Id.*

V. CONCLUSION

In accordance with the associated Order issued by this Court on even date, Order Nos. 84815 and 85501 of the Commission are **AFFIRMED**.

IT IS SO ORDERED, this _____ day of October, 2013.

Judge Audrey J.S. Carrión
Case No.: 24-C-12-002853

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